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No. 03-358

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In The
Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

PUBLIC CITIZEN, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; CITY OF LOS ANGELES; HONORABLE MARY BONO, CONGRESSWOMAN, 45TH DISTRICT, CALIFORNIA; AND HONORABLE ELTON GALLEGLY, CONGRESSMAN, 24TH DISTRICT, CALIFORNIA IN SUPPORT OF RESPONDENTS

PATRICIA V. TUBERT
Chief Assistant City Attorney
City of Los Angeles
OFFICE OF THE CITY ATTORNEY
200 N. Main Street,
700 City Hall East
Los Angeles, CA 90012
(213) 978-8100

BARBARA BAIRD
District Counsel
FRANCES L. KEELER
Sr. Deputy
District Counsel
Counsel of Record
SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT
21865 Copley Drive
Diamond Bar, CA 91765
(909) 396-3535

Attorneys for Amici Curiae

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QUESTIONS PRESENTED

1. Whether, under the National Environmental Policy Act, 42 U.S.C. §4332, agency action that Congress made a prerequisite to allowing Mexico-domiciled trucks to operate throughout the United States is subject to an Environmental Impact Statement that will disclose and evaluate the serious environmental effects caused by such trucking.

2. Whether, under the conformity provision of the Clean Air Act, 42 U.S.C. §7506(c)(1), that agency action requires an analysis into the extent to which permitting Mexico-domiciled trucks to operate throughout the United States will make it difficult for states to comply with federal air quality standards.

Amici disagree with Petitioner's statement of the question presented in this case FMCSA, a federal agency within the Department of Transportation ("DOT"), adopted rules governing both applications for admission of Mexico-domiciled trucks to the United States and the safety of those trucks. These rules independently determine the type and quantity of additional trucks that may enter the United States, and expand the limited border zones in which these trucks can travel. Petitioners argue that this rulemaking action has no independent impact because the President issued an order regarding the same sources regulated by the FMCSA regulations and because FMCSA has no discretion to determine environmental impacts. Petitioners attempt to misdirect the Court's attention to a review of Presidential authority. However, without the actions taken by FMCSA, no trucks would be allowed. The rules are a prerequisite for Mexico-domiciled trucks to travel outside the designated border commercial zones. Thus, Amici submit that the question of Presidential authority is not under review.

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INTEREST OF AMICI CURIAE

The South Coast Air Quality Management District ("SCAQMD"), City of Los Angeles, Honorable Mary Bono, Congresswoman, 45th District, California, and Honorable Elton Gallegly, Congressman, 24th District, California ("Amici") respectfully submit this brief in accordance with Supreme Court Rule 37.3.[1] SCAQMD is the regional air pollution control agency responsible for the South Coast Air Basin ("Basin"), which encompasses the greater Los Angeles region. The City of Los Angeles is a municipal corporation located within the Basin. Congresswoman Bono is the congressional representative of the 45th District, which is located in Riverside County and encompasses areas within the Basin and in the neighboring Coachella Valley. Congressman Gallegly is the congressional representative of the 24th District. The 24th California Congressional District includes portions of Santa Barbara and Ventura Counties, bordering the Basin to the North. Both Ventura County and Coachella Valley are impacted by emissions from the Basin. The Federal Clean Air Act ("CAA"), 42 U.S.C. §§7401 to 7671q, establishes a regulatory scheme for air pollution control that makes states primarily responsible for the control of air pollution within their jurisdictions. 42 U.S.C. §7401. However, Congress specifically reserved many mobile sources for federal regulation. Diesel trucks, subject to the Federal

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[1] The parties consented in writing to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Motor Carrier Safety Administration's ("FMCSA") regulations at issue in this case, are one such federal source. Trucks contribute significantly to air pollution within the nonattainment area under the SCAQMD's jurisdiction. The significant emissions caused by the additional truck traffic allowed by FMCSA regulations are required to be fully disclosed, analyzed and offset where possible in order to achieve clean air for the citizens of Southern California and to comply with federal law.

SUMMARY OF ARGUMENT

In March 2002, FMCSA issued three sets of Interim Final Rules permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States.[2] FMCSA was required to complete an environmental review pursuant to the National Environmental Policy Act ("NEPA"), as well as a conformity analysis pursuant to the CAA prior to the adoption of these regulations. However, instead of completing a thorough analysis, FMCSA presented a cursory environmental assessment for two of the regulations and engaged in no analysis for the third. FMCSA certified a Finding of No Significant Impact ("FONSI") based on it's conclusion that "the FMCSA is

[2] These rules are: (1) Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, 67 Fed. Reg. 12,702 (Mar. 19, 2002); (2) Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12,758 (Mar. 19, 2002); and (3) Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, 67 Fed. Reg. 12,776 (Mar. 19, 2002).

statutorily precluded from considering environmental issues in deciding whether to grant applications to provide CMC transportation in interstate or foreign commerce." U.S. Department of Transportation, Federal Motor Carrier Safety Administration, Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment, January 2002, hereinafter referred to as "EA," J.A. 36 at 52. Further, FMCSA made no attempt to complete a conformity analysis, which would have determined whether their actions would cause or contribute to any new violation of any standard, increase the frequency or severity of any existing violation, or delay timely attainment of any standard or any required interim emissions reductions in a nonattainment area. 42 U.S.C. §7506(c)(1)(B). Petitioners do not address the adequacy of FMCSA's actions in their brief. Instead, Petitioners attempt to focus the Court's attention on the President's actions in issuing an order regarding the same sources regulated by the FMCSA, stating that Respondents want FMCSA to analyze the impacts of the President's actions. Petitioners' Brief 19.

Presidential action does not relieve FMCSA of its responsibilities. FMSCA must recognize that its regulations have impacts that are independent of the President's actions and are required to complete the NEPA process and perform a conformity analysis as Congress mandates. The rules adopted by FMSCA will determine which trucks and, thus how many trucks, will be allowed to enter the United States. The emissions from these trucks will have a significant impact on the Basin and its residents. The Basin is designated an "extreme nonattainment area" for ozone, pursuant to the Federal Clean Air Act. Any emissions increase in excess of 55 pounds per day of NOx is

"significant" for the Basin, and it would only take eight additional trucks to exceed the significance threshold.

An independent researcher hired for Respondents estimates that there could be 50 tons of NOx per day representing thousands of additional trucks traveling through the Basin due to the adoption of the FMCSA rules. See (Report No. SR02-04-01) Critical Review of "Safety Oversight For Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment," prepared by John A. Volpe, Transportation Systems Center, January 2002, April 16, 2002, Sierra Research, Inc., hereinafter "Sierra Research Report," J.A. 307 at 347. The health and welfare of millions of Basin residents will clearly be adversely affected by the adoption of the rules by FMCSA. The agency, at a minimum, should be required to fully analyze and disclose the impacts of its actions, and select less polluting alternatives or mitigation, as required by NEPA and the CAA.

ARGUMENT

I. FMCSA'S RULEMAKING SIGNIFICANTLY IMPACTS THE SOUTH COAST AIR BASIN

In March 2002, FMCSA issued three sets of Interim Final Rules permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States. These rules allow Mexican-domiciled truck operators, who previously could not receive a certificate and operate in the United States, to apply for a certificate of authority to operate their trucks within the United States. These rules also establish a safety monitoring program for the Mexican trucks, whereby the certificates may be

revoked. J.A. 56-72. Trucks emit a variety of air pollutants including oxides of nitrogen ("NOx"), particulate matter ("PM10"), volatile organic compounds ("VOC") and toxic air contaminants. J.A. 314, 451. NOx and VOC react in the presence of sunlight to form ozone. J.A. 317. Ozone causes serious health effects, including inflammation of lung tissues, temporary reduction in lung capacity, aggravation of asthma, and diminishment of the immune system making the body more susceptible to respiratory illnesses. South Coast Air Quality Management District, 2003 Air Quality Management Plan[3], hereinafter "AQMP" at 2-8; Sierra Research Report, J.A. 317. Elevated ambient fine particulate matter (PM10 and PM2.5) contributes to an increase in mortality rates, respiratory infections, number and severity of asthma attacks, and the number of hospital admissions. In recent years, some studies have reported an association between long-term exposure to air pollution dominated by fine particles and increased mortality, reduction in life span, and an increased mortality from lung cancer. Recent studies also show lung function growth in children is reduced with long-term exposure to particulate matter. AQMP at 2-14; Sierra Research Report, *Id.*

The Federal Clean Air Act establishes a regulatory scheme for the prevention of air pollution in which the states have the primary responsibility of assuring the air quality for areas within their jurisdiction. CAA §101, 42 U.S.C. §7401. The states accomplish this by meeting national ambient air quality standards ("NAAQS") established by the United States Environmental Protection

[3] The AQMP is an official publication issued by the SCAQMD. This document is available at http//www.aqmd.gov/aqmp/AQMD03AQMP.htm.

Agency ("EPA"). Within each state, or over the area of several states, EPA has established air quality control regions. CAA §107, 42 U.S.C. §7407. California has several air pollution control regions, and the SCAQMD is the regional air pollution control agency for the Basin including the nondesert portions of Los Angeles, San Bernardino and Riverside Counties and Orange County. Cal. Health & Safety Code §40410.

The Clean Air Act requires the states with areas that do not meet the NAAQS, or are "in nonattainment," to submit plans like the AQMP to bring the areas into attainment by a certain date. The plans contain measures to control specific sources, thereby reducing air pollution. CAA §§109-110, 42 U.S.C. §§7409-10. NAAQS have been established for, among other pollutants, ozone and particulates.

The Basin, with a population of approximately 16 million people, is the single most heavily impacted area in the country by the criteria pollutant ozone. In fact, the Basin is designated as "extreme nonattainment" of NAAQS for ozone. J.A. 238, 319-20. Congress established categories of nonattainment for each pollutant based on the severity of the pollution levels of an area. For ozone the categories are: marginal, moderate, serious, severe and extreme. CAA §181(a), 42 U.S.C. §7511(a). The Basin is also in the classification of "serious" for nonattainment for particulate matter (PM). J.A. 320-21. The Basin is required to demonstrate attainment of the federal PM10 standard by 2006 and the federal 1-hour ozone standard by 2010. CAA §§181, 183, 42 U.S.C. §§7511, 7513. Additionally, in 1997 EPA established new NAAQS for PM2.5 and an 8-hour standard for ozone. Significant improvements in air quality will be necessary to bring the Basin

into attainment by these federal deadlines, particularly for ozone. The AQMP for the Basin sets forth a comprehensive federal, state and local program containing measures to control specific sources. The few years remaining to meet attainment deadlines afford little margin for error in implementing a comprehensive control strategy. Proper FMCSA disclosure and analysis and mitigation, where feasible, are critical to the Basin's ability to meet federally-mandated timelines.

The Basin's severe air pollution problem results from the emissions from the nation's second largest urban area, combined with meteorological conditions that are adverse to the dispersion of those emissions. The average wind speed for Los Angeles is the lowest of the nation's ten largest urban areas. Additionally, the maximum mixing height (an index of how well pollutants can be dispersed vertically in the atmosphere) in Southern California averages the lowest in the U.S. during the summer. Finally, the abundant sunshine drives the photochemical reactions that form pollutants such as ozone. AQMP 2-1.

Since the end of World War II, the Basin has experienced faster population growth than the rest of the nation. Growth has slowed somewhat, however the region's population is expected to increase significantly through 2020. AQMP at 1-4. Ozone levels have been reduced by half over the last 30 years. AQMP at 1-6. Although per-capita emissions have been brought down substantially in the Basin through 50 years of implementing pollution controls, increases in the population over that time have made overall emission reductions more difficult. Increases in the number of sources, particularly those growing proportionally to population, reduce the potential air quality benefits of new controls. The net result is that,

unless significant steps are taken to further control air pollution, growth will overwhelm much of the improvements expected from the existing control program. AQMP at 1-4. Additional sources, beyond those predicted in the AQMP, such as the uncontrolled trucks certified to enter the United States by the FMCSA rules, interfere with this region's ability to reach attainment and thus clean air for all the Basin's residents.

In accordance with CAA §110 and the California Clean Air Act, Cal. Health & Safety Code §40925, requiring triennial plan updates, and in order to fulfill the SCAQMD's commitment to update transportation emission budgets based on the latest approved motor vehicle emissions model and planning assumptions, the SCAQMD revised its AQMP in 2003. AQMP at 1-13. The AQMP contains updated emissions inventories, new modeling and modeling assumptions, and state, local and federal control measures. The AQMP was compiled with the efforts of the EPA, the California Air Resources Board ("CARB"), the SCAQMD, Southern California Association of Governments, environmental and citizens groups, industry and various other state and local governmental agencies. AQMP ES-1, ES-3. The AQMP establishes baseline emissions and seeks to reduce 233 tons per day of NOx emissions by the ozone attainment year, 2010. At the end of the planning process, even with the input of the dozens of entities involved in its development, there remains 181 tons per day of necessary NOx emissions for which specific control measure could not be identified, so-called "black box" emissions. While CARB and the SCAQMD adopted commitments to reduce the emissions and define control measures by the next AQMP revision, a tremendous amount of work remains in actually achieving these

reductions. AQMP at 4-32. These efforts are jeopardized by FMCSA's actions and its failure to conduct any substantive environmental assessment.

For some areas, such as the Basin, mobile sources contribute heavily to air pollution. However, Congress reserved authority to regulate mobile sources such as automobiles, trucks, locomotives, aircraft and marine vessels, for the federal government either exclusively or jointly with the states. See §§209 and 233 of the CAA, 42 U.S.C. §§7543, 7573. According to the SCAQMD's 2003 AQMP, mobile source emissions account for 89% of the Basin-wide NOx emissions, with on-road sources (cars, trucks and buses) accounting for 63%. By 2010, emissions from sources under SCAQMD authority such as refineries, factories, power plants and gas stations will account for only 11% of the total NOx emissions, sources under CARB authority, 56%, and those under exclusive EPA jurisdiction, 33%. AQMP 3-14 to 3-17. To ultimately achieve ambient air quality standards and demonstrate attainment, additional long-term emissions reductions will be necessary from all sources including those primarily under the jurisdiction of CARB (e.g., on-road motor vehicles, off-road equipment, and consumer products) and EPA (e.g., out of state vehicles, aircraft, ships, trains, and pre-empted nonroad equipment)[4]. AQMP 1-1. Without an adequate and fair-share level of reductions from all

[4] As explained in the Senate Report to the 1990 Amendments to the CAA, "[b]ecause States have limited resources and many additional responsibilities, both the State and Federal Government should work together to assure implementation of programs that improve air quality." 1990 U.S.C.C.A.N. at 3389.

sources, the emissions reduction burden would unfairly be shifted to stationary sources that have otherwise done their part for clean air. AQMP 4-2.

The SCAQMD has also established significance criteria pursuant to the California Environmental Quality Act (CEQA) for emissions of criteria pollutants or their precursors. NOx emissions are significant if they exceed 55 pounds per day, and PM10 emissions are significant at 150 pounds per day. The standards were derived from the major source thresholds established by Title I of the CAA. Any stationary source that contributes more than 10 tons per day of NOx is a major source. CAA §182(e); 42 U.S.C. §7511a(e). Ten tons per year is equivalent to 55 pounds per day. These standards would be used for NEPA purposes also. Taking the emissions rate used by FMCSA for a truck (J.A. 146, 399) and assuming it travels the length of the Basin, a distance of approximately 215 miles; it would take less than 8 additional trucks to exceed the NOx significance threshold.

However, based on the studies conducted by Sierra Research, the actual make-up of the Mexican fleet has an emissions rate that is significantly higher than that used by FMCSA. According to the Sierra Research report, Mexican trucks can easily contribute 50 tons per day of NOx. J.A. 347. In comparison the entire stationary and area source inventory (those sources within the jurisdiction of the SCAQMD) for the Basin is only 89 tons of NOx per day. AQMP at 3-12. This inventory is made up of thousands of sources ranging from refineries and power plants to gas stations, drycleaners and house paint. Pursuant to the CAA all major stationary sources, and in accordance with SCAQMD rules, all stationary sources are subject to stringent control requirements including permitting, best

available control technology, offset and reasonably available control technology. CAA §§165, 182(b)(2), 182(e)(1); 42 U.S.C. §§7475, 7511a(b)(2), (e)(1). Therefore, in order to offset the increased emissions from these trucks, the SCAQMD would be forced to shut down more than half of the already stringently controlled stationary sources in the Basin. Since this clearly is not possible, the emissions from the Mexican trucks must be analyzed and reduced in some other manner. While the FMCSA concludes that small increases in the number of trucks traveling through the United States is insignificant, for the Basin, a handful of additional trucks significantly impacts air quality, possibly delaying attainment of healthful standards for the area and seriously impacting the health of our residents. FMCSA must recognize and address the actual impacts in a comprehensive analysis.

II. FMCSA'S RULEMAKING HAD SIGNIFICANCE INDEPENDENT FROM THE PRESIDENTIAL ORDER LIFTING THE MORATORIUM ON MEXICAN TRUCKS

Amici submit that FMCSA's decision to issue a FONSI and not complete a conformity analysis was in error. While Petitioners concede that the FMCSA rulemakings were subject to review under NEPA, Petitioners Brief 10, Petitioners argue that "any environmental consequences of allowing cross-border operations by Mexican trucks are not 'effects' of FMCSA's truck-safety rulemakings." Petitioners Brief 24. Petitioners further state: "FMCSA recognized that the proposed rules would have 'no practical impact' until the occurrence of the 'intervening event' of the President's modification of the trade moratorium." But they also acknowledge that "the President's anticipated

lifting of that moratorium would have no effect until FMCA promulgated the required regulations." Petitioners Brief 10-11. Yet, even though they argue that the effect of one action does not occur until the other action takes place, Petitioners summarily conclude that the increase in the number of trips by Mexican trucks "would be the result of the modification of the moratorium by the President, not FMCSA's implementation of the proposed safety regulations." Petitioners Brief 11.

However, the decision to admit any given foreign carrier depends entirely on that carrier's compliance with FMCSA regulations. FMCSA is the permitting agency responsible for regulating, inspecting, and then admitting qualifying foreign trucks. In determining which carriers are admitted, FMCSA's regulations shape every aspect of the foreign truck fleet that operates in this country, including the number of trucks, the safety of those trucks, and their emissions. "The FMCSA works to ensure safety in CMC operations by developing and enforcing safety regulations, targeting high-risk carriers and CMV drivers, improving safety information systems and CMV technologies, strengthening CMV equipment and operating standards, and increasing safety awareness." J.A. 51. As the permitting agency, FMCSA is continuously responsible for the characteristics of the fleet of Mexican carriers in this country. It is this determination of the size and make-up of the Mexico-domiciled fleet that is at issue, not the independent actions of the President.

Petitioners argue that this is a case about the President's foreign policy power. In fact, lifting the moratorium was not an act of the President's constitutional foreign policy power; rather, it was an exercise of power that Congress specifically allowed the President to exercise.

Under federal law, the President was allowed unilaterally to lift the congressionally imposed moratorium, Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, Tit. I, §101, 109 Stat. 804 (49 U.S.C. §1309 *et seq.*) 49 U.S.C. §13902(c), but Congress still maintains the ability to impose conditions on cross-border trucking. In fact, Congress did. In 2001, Congress passed the Department of Transportation and Related Agencies Appropriations Act, 2002, which conditioned funding the processing of permit applications from Mexican carriers on the FMCSA's promulgation of new safety standards. Department of Trans. and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, §350, 115 Stat. 833, 864-68 (2001). This confirms the independent significance of the FMCSA rule adoptions.

Because the President's actions to implement foreign policy and foreign trade decisions is not the issue, holding that FMCSA must comply with federal environmental requirements will not impair that power in any way. Once the President exercises his authority to lift the barriers, the trucks are governed by FMCSA regulation. Those regulations have effects and those effects must be analyzed.

III. FMCSA'S ACTIONS ARE WITHIN THE CATEGORY OF FEDERAL ACTIONS CAUSING IMPACTS TO STATE AND LOCAL INTERESTS THAT CONGRESS SOUGHT TO AVOID THROUGH THE ADOPTION OF NEPA AND CAA REQUIREMENTS

The March 2002 Interim Final Rules adopted by FMCSA permitting entry of Mexico-domiciled trucks into this country for operation throughout the United States were subject to the requirements of NEPA and the CAA. FMCSA recognized that it must comply with NEPA and, prior to the issuance of these regulations, began the

process of completing a preliminary environmental assessment ("PEA"). J.A. 36. However, FMCSA failed to completely analyze the environmental impacts caused by its rule adoption. FMCSA narrowly focused the environmental assessment. "This PEA will focus only on the potential environmental impact and safety operation implications of the proposed actions and alternatives based on: (1) the change in the number of Mexico-domiciled CMC receiving certificates of operating authority pursuant to the revised application forms (i.e., OP-2 and OP-1(MX) Forms), and the associated change in the number of Mexican CMV operating in the United States; and (2) the change in the number, method, and frequency of inspections conducted on Mexican CMV operating in the United States." J.A. 48. Because of this limited focus and a number of unsupported assumptions, such as assuming no change in the total number of inspections performed, 130,000 of 400,000 Mexican trucks manufactured after 1994, and including no calculations of trucks over U.S. weight limit of 80,000 pounds, J.A. 203-205, FMCSA found no significant impacts. Thus, FMCSA issued a Finding of No Significant Impacts for two of the regulations, and found it was entirely exempt on the third. FMCSA did not ever address the need to make a conformity finding for the Basin pursuant to the CAA. These actions do not comply with either NEPA or the CAA.

A. Congress intended that the FMCSA fully assess the local impacts of its regulations under NEPA and mitigate or find alternatives with less severe impacts

NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in

. . . major Federal actions significantly affecting the quality of the human environment, a detailed statement" with respect to "the environmental impact of the proposed action, . . . alternatives to the proposed action," and other environmental issues. 42 U.S.C. §4332. Moreover, "to the fullest extent possible . . . policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA. 42 U.S.C. §4332. The NEPA process determines whether an action is one that "significantly" affects the environment, including an examination of direct effects and indirect effects that are "reasonably foreseeable" as well as "cumulative." 40 C.F.R. §1508.8. Significant effects include contextual effects such as ecological, aesthetic, historical, cultural, economic, social and health impacts as well as an intensity examination of direct, indirect and cumulative impacts. 40 C.F.R. §1508.27a. NEPA also requires that regional and local areas be evaluated for the proposed action's impacts upon them. *Id.* The first step in this NEPA process was the Environmental Assessment ("EA"). An EA is required to provide "sufficient evidence and analysis" to enable an agency to determine whether to prepare a full Environmental Impact Statement (EIS) or a FONSI, and to aid the agency in complying with NEPA when no EIS is prepared or facilitate preparation of an EIS when one is necessary. 40 C.F.R. §1508.9. The EA shall also include "brief discussions" describing the need of the proposed action, alternatives to the action, the environmental impacts of the proposal and its alternatives and a list of the agencies and persons consulted. *Id.*

The fact that the FMCSA rules were subject to NEPA is undisputed. FMCSA prepared an EA and a FONSI. J.A. 34-35, 36-231. It is the adequacy of the document that is in

dispute. As discussed supra at part II, FMCSA's actions in adopting the three rules had independent impacts. FMCSA failed to comply with the NEPA process when it concluded that the impact need not be analyzed. These impacts are significant in the Basin, and, therefore, FMCSA should have prepared an EIS.

The EA failed to account for emissions increases beyond those created by idling at the inspection stations. J.A. 48. The EA did not analyze toxic emissions. FMCSA erroneously concluded there would be no impacts from its rules beyond the year 2002, yet the safety inspection and certification programs do not end in 2002. As stated previously, FMCSA used unsupported assumptions to obtain a finding of no significance. J.A. 203-205.

FMCSA utilized models based on U.S. vehicles, not Mexican vehicles. J.A. 205. FMCSA, thus, ignored existing and future differences between U.S. and Mexican trucks in their emissions estimations and standards. J.A. 332-335, 391-395. A report prepared for the state of California by Environ ("Environ"), J.A. 387-413, and the Sierra Research report both concluded that the average Mexican truck is older than the average U.S. truck. This means that the average Mexican truck will have more emissions that the U.S. truck, due to the deterioration of the emissions control system and the difference in standards over time. J.A. 334-335; 360; 394-395. The fleet of Mexican trucks has also not been subject to the same emissions standards as the U.S. fleet, resulting in higher emissions from Mexican trucks compared to U.S. trucks of the same model year. J.A. 332-334 and 391-394. Additional stricter standards apply to U.S. trucks starting in 2007. J.A. 315. Sierra Research estimates that in 2010, the average Mexico-domiciled truck will emit between 2-2.4 times more

NOx, between 2.2-3 times more PM2.5, between 2.2-3 times more PM10 and between 2.1-2.3 times more VOC than the average U.S. truck due to age and emissions differences. J.A. 337.

As previously noted, the SCAQMD updated its AQMP in 2003 to incorporate new scientific data in the form of updated emissions inventories, air quality modeling tools and control measures. It is important to note that no information was provided to any of the agencies on the potential increase in emissions due to additional Mexican-domiciled trucks entering the Basin. Thus, these emissions were not included in baseline emissions, growth projections or necessary future reductions. Had FMCSA adequately assessed the impacts of its regulation as required by NEPA, this information would have been available to the SCAQMD. An important purpose of NEPA is to provide "advice and information useful in restoring, maintaining, and enhancing the quality of the environment" to states, counties, municipalities, institutions and individuals. 42 U.S.C. §4332(G). The document prepared by FMCSA fails to meet this purpose, and yet it is this informational purpose that is essential to the SCAQMD's preparation of an adequate air quality control plan. NEPA requires FMCSA to provide the information on the negative impacts the Mexican trucks will have on the Basin's air quality.

Perhaps the most important failure of the EA is its lack of a localized impacts analysis. FMCSA failed to determine whether its rules would have a significant impact based on the particular circumstances of this extreme nonattainment area. The Environ study estimates that Mexico-domiciled trucks will produce 40% more NOx and 100% more PM10 in 2010 than California trucks using

different models. J.A. 400. These estimates were derived utilizing the best scientific data currently available and underscore the importance of a full EIS by FMCSA to determine the true impacts by the emissions from the Mexican trucks on air quality in the Basin and other impacted areas.

The Mexican trucks are also not subject to the CARB and EPA consent decrees requiring U.S. trucks to be retrofitted to correct a device that is designed to circumvent emissions standards, which EPA expects will reduce emissions of U.S. trucks built between 1993 and 1998 by 36%, and to meet the national standard earlier in California. J.A. 397. Finally, the Mexican fleet will also purchase most of its diesel fuel in Mexico that is not as clean as the low sulfur diesel fuel currently required by California, adding to significant particulate emissions in the Basin. J.A. 380, 475.

Even if we were to believe FMCSA's unfounded assumptions that Mexican trucks will merely replace U.S. trucks on the roads rather than increasing the total number of trucks, significant impacts will be realized for the above-stated reasons, of lower emissions standards, dirtier diesel fuel, older trucks, and lack of retrofitting devices. Sierra Research found that replacing 50% of U.S. trucks with Mexican trucks in the Basin would result in an increase of 50 tons per day of NOx emissions and 1.2 tons per day of PM10 emissions in the year 2010 even without an increase in traffic. J.A. 347. According to Federal Highway Administration studies, the Basin lies on one of the major U.S./Mexico truck traffic corridors where the amount of freight carried by Mexican trucks may substantially increase. Thus, even a replacement of the

U.S. fleet will exacerbate the previously mentioned impacts on air quality. J.A. 322-25.

Regardless of whether the Mexican fleet replaces U.S. trucks or adds to the truck traffic in the Basin or both, significant air quality impacts will be realized in an area that already is in extreme nonattainment and is having difficulty meeting federal standards of air quality. Therefore, a complete EIS on the impacts of the Mexico-domiciled trucks to the environment by FMCSA with the requisite alternatives and mitigation is necessary in order to assure that the Basin and other affected areas meet federal standards for air quality. The EA prepared by FMCSA is inadequate and does not meet Congressional intent that federal actions assure the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences. 42 U.S.C. §4331.

B. Congress required that the impacts of the FMCSA's regulations be fully analyzed pursuant to the Clean Air Act

The Clean Air Act creates a partnership between federal, state, and local governments to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §7401. Congress recognized that the states couldn't meet these standards alone. Accordingly, the CAA prohibits the federal government from approving or supporting any activity that does not conform to a plan. 42 U.S.C. §7506(c)(1). This "conformity" provision insures that the federal government does not interfere with local efforts to meet the demanding federal and state air quality requirements. The statutory

language of the CAA is sweeping: "[n]o department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan. . . ." *Id.* All federal agencies are required to affirmatively show that their actions will not cause or contribute to any new violation of any standard, increase the frequency or severity of any existing violation, or delay timely attainment of any standard or any required interim emissions reductions in a nonattainment area. 42 U.S.C. §7506(c)(1)(B).

The EPA's implementing regulations require federal agencies to issue a conformity determination "for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action" would equal or exceed specified levels. 40 C.F.R. §93.153(b). As the Basin is classified as an extreme ozone nonattainment area and a severe PM10 nonattainment area, the applicable levels for increased emissions in the Basin are 10 tons per year of NOx (the same threshold as for major sources), 40 C.F.R. §93.153(b)(1), and 70 tons per year of PM10. 40 C.F.R. §93.153(b)(2). Again, this is equal to 55 pounds per day of NOx, which is exceeded by a mere 8 additional trucks. The influx of Mexican trucks due to the FMSCA regulations, however, will lead to increased emissions in the Basin that far exceed the threshold levels. According to the Sierra Research study, the regulations would result in an increase in NOx emissions by 2010 of 50 tons *per day* in the Basin. J.A. 347. SCAQMD's current AQMP makes no provisions for these increased emissions.

FMSCA has failed to clearly demonstrate that its actions will not lead to an increase in Basin emissions above these levels. To the contrary, as the Court of Appeals

held, the EA on which FMSCA relies is "inadequate to comply with the CAA" as it lacks any consideration of the regional impact that the regulations will have on the Basin or other nonattainment areas. 316 F.3d at 1030; JA 36-231. Moreover, the Court of Appeals correctly found that FMSCA "systematically underestimated the emissions that would result from its regulations." 316 F.3d at 1030. The promulgation and implementation of the regulations will result in Mexican-domiciled trucks being allowed to travel through the Basin. J.A. 49-50, 58. Under EPA rules, the increased emissions in the Basin resulting from this influx of Mexican trucks are indirect emissions caused by the FMCSA's actions that must be taken into consideration in a proper conformity determination. EPA defines "indirect emissions" as those emissions that: "(1) are caused by the Federal action, but may occur later in time and/or may be further removed in distance for the action itself but are still reasonably foreseeable; and (2) the federal agency can practicably control and will maintain control over due to a continuing programming responsibility of the Federal agency." 40 C.F.R §93.152. While Petitioners do not dispute that the federal action is the cause of the increased truck traffic through the Basin[5], they

[5] According to the EPA rules, emissions are "caused by" Federal actions if they "would not otherwise occur in the absence of the Federal action." 40 C.F.R. §93.152. Federal action is defined as "any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves . . . Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval." *Id.*

erroneously argue that the increased emissions are not within the "continuing program responsibility of the agency." Petitioners Brief 45. According to the EPA, "[w]here an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of continuing program responsibility." 40 C.F.R §93.152. By promulgating and implementing the regulations, the FMSCA has, as part of its normal program responsibilities, imposed conditions that make it possible for Mexican-domiciled trucks to travel through the Basin. Not only will no Mexican trucks be allowed into the Basin if the FMSCA does not promulgate the rules, but also each Mexican-domiciled truck that enters the Basin will do so only because it has complied with FMCSA's application and safety regulations and has thereby been issued a certificate of authority by the agency in accordance with the regulations. Moreover, any change that FMSCA makes to the regulations has the potential to change the number and type of trucks admitted into the United States. Thus, the amount of emissions from Mexican trucks traveling through the Basin will remain under the FMCSA's practicable control and part of its continuing program responsibility.

Allowing the regulations to be implemented without requiring a conformity analysis of the impact of these Mexican trucks on SCAQMD's air quality plan will have a tremendous impact on the ability of the Basin to meet state and federal air quality standards and will have negative impacts on the health of millions of people.

CONCLUSION

The judgment of the court of appeals should be upheld.

Respectfully submitted,

FRANCES L. KEELER
Sr. Deputy District Counsel
Counsel of Record
SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT
21865 Copley Drive
Diamond Bar, CA 91765
Attorneys for Amici Curiae